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June 6, 2011

***, Superintendent

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION
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RE: **FINAL REPORT:** In the Matter of ***, 2011-02, Alleged Violations of the Individuals With Disabilities Education Act (IDEA) and Montana special education statutes.

Dear Mr. and Mrs. *** and Superintendent ***,

This is the Final Report pertaining to the above-referenced state special education complaint ("Complaints") filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. *** ("Complainants"), parents of *** ("Student") through counsel, allege the *** School District ("District") failed to provide a free and appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, MCA, and corresponding regulations at 34 CFR Part 300 and ARM 10.16.3007 et seq. Specifically, Complainants allege:

1. The District failed to give the Complainants opportunities to participate in the development and implementation of the Behavior Intervention Plans and failed to include positive behavioral interventions and supports;
2. The District failed to take the required actions in response to the Complainants' request for an Independent Education Evaluation; and
3. The District failed to timely identify the Student's eligibility category of Autism and provide appropriate services.

A. Procedural History

1. On April 5, 2011, the Montana Office of Public Instruction (OPI) received a Complaint signed by Complainants.
2. The OPI Early Assistance Program (EAP) attempted to resolve the controversy pursuant to Admin. R. Mont. 10.16.3660. The EAP Director concluded that resolution was not possible.
3. The District provided a written response to the Complaint dated April 13, 2011.
4. An investigator was appointed as part of the investigation and conducted interviews with Complainants and counsel for Disability Rights Montana, special education teacher ***, and High School Principal ***. The Student's educational record was reviewed, as well as documents all submitted by the District and the Complainants.

B. Legal Framework

The OPI is authorized to address violations of the IDEA and Montana special education laws through this special education procedure as described in 34 CFR §§ 300.151-153 and ARM 10.16.3661 and 10.16.3662. When the OPI finds a failure to provide appropriate services, 34 CFR § 300.151 specifies, in resolving a complaint and pursuant to its general supervisory authority under Part B of the Act, the OPI must address (1) the failure to provide appropriate services, including corrective action appropriate to address the needs of the child...and (2) appropriate future provisions of services for all children with disabilities.

B. Issues

1(a). Whether the District failed to give Complainants adequate opportunities to participate in the development and implementation of the Student's Behavior Intervention Plans.

Findings of Facts - Issue 1

1. Complainants have standing to file this Complaint under the Montana special education complaint process provided for in ARM 10.16.3661.
2. The Student is a 17 year-old tenth grader attending high school in the District.
3. The Student's previous Individualized Education Program (IEP) and his current IEP of December 17, 2010 list only the eligibility category of "Other Health Impairment (OHI)."
4. According to the District's Eligibility (Evaluation) Report dated November 15, 2010, the Student is eligible under the categories of OHI, Specific Learning Disability, and Autism.
5. The parties convened a meeting on August 23, 2010, and a behavior plan was developed (August plan). The August plan addressed "misbehaving" and, with the exception of an "option to go to the resource room office if he feels he needs to get away to a safe place and calm down," the plan focused solely on negative consequences of verbal warnings, written warnings, removal to office, detention, and confinement to the resource room. The August plan was signed by Complainants, the Student, a teacher, and an administrator.
6. In September, a behavioral incident occurred, involving threats of violence and the police being called. On September 2, 2010, the District proposed a modified behavior plan (September plan).
7. The September plan included such items as: "complies with adult directives"; "refrain from threatening or harassing others"; and "law enforcement will be contacted and the level system will be in place." Although the District sought assistance in creating the behavior plan, the plan contained no positive behavioral interventions and supports.
8. Complainants objected to implementation of the September plan claiming it was inappropriate to the needs of [student]. The September plan was not implemented.

9. By October 20, 2010, a Functional Behavioral Assessment (FBA) was completed which consisted of a BASC-2 assessment, classroom observation, and review of behavioral logs. The FBA indicated among other things that the behaviors of concern were noncompliance with teacher directives, verbal aggression, and disruptive behavior.
10. During the fall of 2010, the Student continued to have non-violent behavior incidents and missed school due to anxiety.
11. On November 15, 2010, the IEP team met to discuss the completed FBA and the meeting reconvened November 24, 2010. No agreement was reached and Complainants requested a new IEP with regard to qualifications for eligibility under the autism category and the behavior plan.
12. On December 6, 2010, Complainants informed the District via letter that the Student would not attend school until they could meet again and more thoroughly address his behavior needs.
13. On December 17, 2010, the IEP team met again accompanied by an IEP facilitator. The team drafted a Social/Emotional/Behavioral goal addressing some classroom behaviors. A hand-written note stating "Crisis Plan" is written on the IEP without explanation.
14. The December 17, 2010 IEP Notes reference behavioral concerns and discuss possible interventions. They state "[Facilitator] said she would like the behavior plan to be called an intervention plan, rather than a behavior plan."
15. A Behavior Intervention Plan (BIP) completed around the time of the December IEP (December BIP) references an exception to the BIP for crisis situations under the heading "Crisis Response." The parties disagree about whether the Crisis Plan was written during the meeting and whether the parents had input.
16. On January 3, 2011, the District requested the Student sign a Crisis Plan. The Student refused to sign it.
17. It is not clear when the BIP document was provided to Complainants but by January 19, 2011, Complainants were requesting a copy of the "Crisis Plan" referenced in the IEP. By email the District provided the portions of the Social/Emotional/Behavioral goal in the IEP and the "Crisis Intervention Plan" portion of the above BIP.
18. The "Crisis Plan" provided in the District email to Complainants reads:
 1. If [Student] becomes agitated and request[s] to go to the office, staff will acknowledge him and allow him the opportunity to go to the office.
 2. The staff member working with him will give him space for 10 minutes. The staff member will then approach [Student] and give him the choice to discuss the issue or write it down.
 3. If [Student] is unable to resume his school day, he will be given the option to go home.
19. The "Crisis Plan" has been in place since that time.
20. On January 20, 2011, the Complainants approved the IEP with the following exceptions among others: "[Student] needs a detailed Positive Behavior Intervention Plan written and implemented" and for the Social/Emotional/Behavioral goal: "Have not received Crisis Plan-needs social skills goals-positive supports."

Analysis and Conclusions of Law- Issue 1(a)

Complainants allege the District failed to give them adequate opportunity to participate in the development of the proposed BIPs, and implemented a "Crisis Plan" without their consent. Complainants argue that the December 17, 2010 handwritten "Crisis Plan" notation on the IEP was not discussed, and they would have refused to sign the plan if they had known about it. They argue further that the District attempted to circumvent their participation by attempting to have the Student sign his approval of the Crisis Plan.

The District states Complainants have been involved throughout the meetings and discussion regarding the proposed BIPs. During the meeting on December 17, 2010, the District claims that the IEP team discussed a behavior intervention plan which was renamed a Crisis Intervention Plan at the request of Complainants and was "...written right into the IEP." The District reports the "Crisis Plan" is currently being implemented as a crisis (emergency) intervention plan, but not as a broader behavior intervention plan.

A school district must provide parents with an opportunity to participate in IEP decisions. 34 CFR § 300.322. A district is required to obtain written consent from parents before implementing an IEP. ARM 10.16.3505. A review of the records shows Complainants had ample input into the proposed BIPs, evidenced by the continuous emails between the District and Complainants regarding Complainants requests and concerns. The District responded to parental inquiries by giving notice of their position, from which Complainants filed this complaint.

The IDEA terms "participation" and "input" do not necessarily mean agreement. Here, the proposed BIPs were not implemented because of Complainants' objections. The District is found to be **in compliance** with the parental participation provisions at 34 CFR § 300.322 on this matter.

1(b). Whether the District was required, but failed, to provide an adequate behavior intervention plan and/or positive behavioral interventions and supports.

Complainants allege the District ignored their requests to create a behavior intervention plan containing positive behavioral interventions and supports and unilaterally adopted two punitive behavior plans without going through the IEP team and over their express written objections. The District argues that Complainants did have input into the BIP which also contained the "Crisis Intervention Plan."

The Student's annual IEP meeting was in December of each year. However, by at least August 23, 2010, the Student's behavior had reached a level of concern such that the parties sought to implement a behavior plan for the coming school year.

Functional Behavioral Assessments (FBAs) and BIPs are not required to be part of a student's IEP unless incorporated as part of a disciplinary proceeding provided for in 34 CFR §300.530.

Neither term is defined in the IDEA. While BIPS and FBAs can be useful tools, they are not federally required components of an IEP under 34 CFR §300.320. See Comments, *Fed. Reg.*, Vol 71, No. 156, Monday, August 14, 2006, Rules and Regulations, p.46629. While the OPI encourages their use, Montana law does not consider FBAs and BIPs to be part of a student's IEP unless incorporated into an IEP by reference, or in cases where an IEP team identifies aversive treatment procedures as necessary for a student who exhibits behaviors that "pose a risk of significant damage to property, or significantly disruptive or dangerous behaviors which cannot be modified solely through the use of positive behavioral interventions" thus requiring aversive procedures such as physical restraint and isolation time-out in a closed room as defined in ARM 10.16.3346. Exclusion time out is not considered to be an aversive treatment procedure. *Id.* Parents must provide consent for aversive procedures to be used in their child's IEP. In this case, the District did not propose the use of aversive procedures in the Student's behavior plans. Complainant's argument that the aversive treatment standards apply here is misplaced.

However, the IEP team had determined that the Student's behavior impeded his learning or that of others. For any student whose behavior impedes the student's learning or that of others, the IEP team "must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]" 34 CFR §300.324(2)(i). The BIPs did not do so.

The August (behavior) plan addressed the Student's "misbehavior." The September plan sought to address disruptive or dangerous behaviors in an emergency situation. This plan referenced being respectful, refraining from threatening or harassing others, complying with adult directives within one minute, and not bringing any materials to school that had to do with weapons or violence. The plan contained a "severe" clause which addressed threatening and physically accosting behavior resulting in the police being contacted and application of a levels system, presumably a reference to the District's Student Discipline policy. Neither plan addressed whether the behaviors could be modified through the use of positive behavioral interventions as required by 34 CFR § 300.324. The December 17, 2010 IEP had only a hand-written note stating "Crisis Plan" with no explanation. It did not reference the behavior plan which did contain limited staff instruction for interventions.

Because the Student's behavior impeded his learning, the Student's IEP was required to address positive behavior interventions and supports whether through a BIP or otherwise. Further, a crisis plan is not defined or contemplated in the IDEA. It does not address positive behavioral interventions. Here, the crisis plans addressed emergency situations with dangerous behavior. Such behavior is generally addressed in a district's discipline and safety procedure and applied to all students, or where a student's IEP incorporates use of aversive procedures needed to address the behavior of an individual with disabilities.

The District did not distinguish emergency procedures from IEP mechanisms that would address the Student's behavior in the classroom setting. Absent the use of aversive procedures, IEP mechanisms to address positive behavior interventions and supports may or

may not take the form of a behavior plan. Here, the District's attempts to address the Student's behavior were generally punitive and created on-going concern by Complainants. Positive behavioral interventions and supports should have been addressed for this Student from the time the IEP team determined that his behavior impeded his learning or that of others. The August and September BIPs did not do so. While the December 17, 2010, IEP notes began to address positive behavioral interventions and supports, Complainants are correct that the District failed to adequately meet its obligations **in violation of 34 CFR §300.324(a)(2)(i)**.

2. Whether the District failed to take the required actions in response to Complainants' request for an Independent Education Evaluation.

2. Findings of Fact

1. A Functional Behavioral Assessment (FBA) consisting of a BASC-2 assessment, classroom observation, and review of behavioral logs, was completed on October 20, 2010. The assessment indicated, among other things, that the behaviors of concern were noncompliance with teacher directives, verbal aggression, and disruptive behavior.
2. On February 2, 2011, the Complainant wrote a letter requesting an Independent Education Evaluation (IEE) and a Functional Behavior Assessment.
3. On February 25, 2011, the District denied Complainants' request stating the basis of the decision was that there was little change from the previous evaluations and a new evaluation was not necessary. The District provided Complainants with a copy of the Procedural Safeguards Notice.

2. Analysis and Conclusions of Law

Parents have the right to an independent education evaluation at public expense if they disagree with an evaluation obtained by a district, subject to the conditions in 34 CFR §§ 300.502 (b)(2) through (b)(4). If a parent requests an IEE at public expense, the district must, without unnecessary delay, either file a due process hearing request to demonstrate its evaluation is appropriate, or ensure that an IEE is provided at district expense unless the district demonstrates at a hearing that the IEE did not meet district criteria. 34 CFR § 300.502(b). Additionally, when a parent requests an IEE, the district must provide the parent information about where an IEE may be obtained and the district criteria applicable for IEEs. 34 CFR § 300.502(a)(2).

In this case, there appeared to be some confusion on how to proceed with the matter of an IEE, and the District responded to the IEE request by providing a letter of denial. The District now understands that by failing to pursue either a due process hearing or provide the IEE at district expense after giving Complainants the necessary IEE criteria, it did not meet the federal requirements. The District is in **noncompliance** with 34 CFR § 300.502 on this issue.

3. Whether the District erroneously failed to timely identify the Student's eligibility category of Autism and provide appropriate services.

3. Findings of Facts

1. Complainants received a letter dated June 25, 2010, from Dr. Denegre diagnosing the Student with Pervasive Developmental Disorder, Obsessive-Compulsive Disorder, Attention Deficit/Hyperactive Disorder, and Mood Disorder.
2. On or about June 25, 2010, Complainants provided the District with Dr. Denegre's letter.
3. Complainants provided general information and materials related to the Student's Autism/Pervasive Developmental Disorder to the District.
4. On November 15, 2010, the District convened a meeting to address the Student's eligibility for Autism and/or Emotional Disturbance.
5. The eligibility category of Autism was added to the Student's eligibility. The basis for the determination stated "[h]e would qualify under the Autism disability criteria because of PDD according to...[OPI]."
6. As part of the Autism evaluation report, the District reviewed the Student's classroom performance but did no additional assessments or reviews of existing data.
7. On December 17, 2010, an IEP was conducted. The disability category on the IEP is marked Other Health Impairment (OHI).
8. Complainants approved the IEP on January 20, 2011, but listed an exception disapproving of the disability category exclusion of Autism.
9. The OPI's Achievement in Montana (AIM) data program for IEPs allows for only one disability category to be listed on the IEP.
10. The Autism category is listed on the Student's evaluation report along with OHI.
11. The December 17, 2010, IEP under the Social/Emotional/Behavioral goal states that the FBA "results are consistent with the diagnoses given by Dr. Denegre."

3. Analysis and Conclusions of Law

A. IEP Form

While it is apparently true that only one disability category can be listed on the AIM computer program form for IEPs, additional disability categories may be written onto the IEP hard copy or the Notes. The AIM system provides for on-line development of documents, such as evaluation report, IEP, and progress notes, but does not replace hard copies or required documents. The hard copy, signed by the parents, is the official IEP. The District is not precluded from adding to, or subtracting from, the computer copy as long as the hard copy represents the agreed upon IEP.

B. Autism Evaluation

Apart from the AIM computer form issue, the investigation revealed serious concerns about the District's process identifying the Student as eligible under the category of Autism due to

the implications for determining services. A student must be comprehensively evaluated for all areas of suspected disability and a district is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. 34 CFR §300.304(c). This information is used not only to determine eligibility but, equally important, to determine appropriate educational programming. Further, no single criterion may be used for determining eligibility and the child's educational programming. 34 CFR § 300.304. Complainants' assertions that the District did not adequately consider the implications of Student's autism is born out in following noncompliance identified in the Student's Autism evaluation:

1. The District did not timely address Dr. Denegre's June 25, 2010 letter identifying the Pervasive Developmental Disorder. 34 CFR § 300.502(c).
2. The District reviewed only existing data for the November 15, 2010 evaluation report and did not indicate why additional data was not needed. This was insufficient in light of the Student's needs and abilities 34 CFR § 300.304(c)(6) and 34 CFR § 300.305 (d)(1)(i).
3. There is no indication that Complainants were informed of the right to request additional assessments. 34 CFR § 300.305 (d)(1)(ii).
4. The November 15, 2010, evaluation report did not address the eligibility criteria for Autism. 34 CFR § 300.8 (c)(1)(i).
5. The evaluation report did not report present levels of academic achievement and related developmental needs of the Student. 34 CFR § 300.305 (a)(1)(B)(ii).
6. There is insufficient basis in the evaluation report for determining the Student eligible and in need of specially designed instruction. 34 CFR § 300.8 (a)(1).
7. The IEP was not modified to reflect the Student's evaluation of Autism. 34 CFR § 300.306 (c)(2).

Given these factors, it is clear the District failed to timely identify and adequately evaluate the Student's eligibility category of Autism in **violation of 34 CFR §§ 300.304 and 300.305**. The failure to adequately evaluate, failure to provide positive behavioral interventions and supports in the Student's IEPs, the Student's subsequent behavior incidents with resultant absences due to anxiety about school, and failing grades, indicate the Student did experience educational harm. The Student's IEPs also reveal concerns and issues contributing to this harm, including:

1) The Student's annual goals are not measureable although they do relate to the Student's present levels, which do provide sufficient information upon which to base annual goals. 34 CFR § 300.320. The IEP team must draft measurable goals.

2) The November 5, 2010 progress reports based on the April 15, 2010 IEP indicate that the Student was "Not expected to meet goal" in all areas except one, which was "Goal not started." The January 17, 2011 progress reports indicate that Student was "Expected to meet goal" in all areas despite the comments, "Because of the D-grade," "[Student] has just started working towards this goal," and "Because of the failing grade." Progress reports appear to only have been done through January 17, 2011. The District did not provide any data to verify

the Student's progress, including behavioral. The District must re-evaluate the goals and take specific steps to address the impediments to reaching the goals.

3) The November 15, 2010 evaluation report contained no information regarding the Student's present levels of performance. The District must reevaluate using the Student's present levels of performance and make IEP changes as appropriate.

4) The Student's grades were modified, although grade modification was not an accommodation in his IEP. A decision to modify the Student's grades must be made, as appropriate, by the IEP team and included in the IEP.

The District will need to address compensatory services to the Student as discussed below.

E. Disposition

The District is hereby ORDERED to take the following steps:

1. By **September 7, 2011**, the District must review and revise its policy towards IEEs to ensure compliance of 34 CFR § 300.502. The policy must be approved by the Dispute Resolution/EAP Office and then a copy, either written or electronically, shall be sent to all District administrators and special education staff.¹
2. By **September 7, 2011**, the District will provide training to the special education staff, including administrators, to address the following areas of noncompliance:
 - Parent consent to IEPs
 - Developing Behavior Intervention Plans, including Positive Behavior Supports
 - Written Notice and the use of IEP notes
 - Writing measureable goals
 - Evaluation procedures
 - IEP accommodations
 - Progress reportingThe trainer must be approved by the Dispute Resolution/EAP Office. All participants must be signed in and the list forwarded to the Dispute Resolution/EAP Office.
3. By **September 7, 2011**, the District must reconvene the Student's IEP team to develop an Evaluation Plan to assess the Student's achievement levels and behavior. The OPI will provide assistance upon request of the District.
4. By **September 14, 2011**, the IEP team shall review and revise the Student's IEP to meet compliance in keeping with the new evaluation plan and the corrective actions delineated in Issue 3 above.
5. In conjunction with appointed OPI personnel, by **September 14, 2011**, the District shall review all existing data, including the achievement tests and behavioral assessments and the IEP team shall determine appropriate compensatory services to remedy the educational harm to include frequency and amount of services. The decisions regarding compensatory services must be

¹ The September timeframes are an exception to the 60-day compliance timeline in ARM 10.16.3662 due to summer break.

approved by the Dispute Resolution/EAP Office and accompanying documentation must be sent and received by **September 21, 2011**.

6. To ensure that the District maintains compliance, the District must send the evaluations, IEPs, and progress reports of two randomly selected students whose IEPs occur *after* the required training. All required documentation on the two students must be sent to the Dispute Resolution Office on a quarterly basis until notified by the Office that the District has adequately demonstrated continued compliance.

Sincerely,

Ann Gilkey, Compliance Officer
Chief Legal Counsel

c: Mary Gallagher, Dispute Resolution/Early Assistance Program Director